

DEBRA S. BELAGA (S.B. #083237)
dbelaga@omm.com

AARON M. ROFKAHR (S.B. #227008)
arofkahr@omm.com

O'MELVENY & MYERS LLP
Embarcadero Center West
275 Battery Street
San Francisco, CA 94111-3305
Telephone: (415) 984-8700
Facsimile: (415) 984-8701

Attorneys for Defendant
Bank of America N.A., successor in interest to
Bank of America NT & SA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN L. WHEELER; GLORIA A.
WHEELER,

Plaintiffs,

v.

BANK OF AMERICA NT & SA;
LIBERTY REVERSE MORTGAGE;
SEATTLE FINANCIAL GROUP,

Defendants.

Case No. C-08-03230-VRW

**NOTICE OF PENDENCY OF OTHER
ACTION OR PROCEEDING
PURSUANT TO CIV. L.R. 3-13**

Pursuant to Civil Local Rule 3-13, Bank of America N.A., successor in interest to Bank of America NT & SA (“Bank of America”), respectfully gives notice of the following related actions: *Miller v. Bank of America*, California Supreme Court Case No. S149178 (“*Miller*”) (on appeal from *Miller v. Bank of America*, San Francisco Superior Court Case No. CGC-99-301917) and *Anderson v. Bank of America*, San Francisco Superior Case No. CGC-05-438769 (“*Anderson*”). *Miller* and *Anderson* are brought as class actions, and relate to the above-captioned action (“the Federal Action”) because they involve many of the same parties in interest, similar subject matter, and the same factual and legal issues.

1. Description Of The Actions

Miller was filed on August 13, 1998 in Superior Court for the County of Alameda, but was later transferred to San Francisco County. On October 16, 2001, court certified a class. On March 4, 2005, the trial court entered a Judgment for plaintiffs in *Miller*. On November 20, 2006, the California Court of Appeal for the First Appellate District reversed the trial court’s Judgment in *Miller*. On March 21, 2007, the California Supreme Court granted plaintiffs’ petition for review in *Miller*. *Anderson* was filed on February 17, 2005 in the Superior Court for the County of San Francisco, and was stayed on October 25, 2005 pending the resolution of *Miller*.

2. Title And Location of Court of the State Actions

Miller is pending in the Supreme Court California. The appeal has been fully briefed; a hearing date has not been set. *Anderson* is pending in the Superior Court for the County of San Francisco.

3. Relationship Of The Actions

The Federal Action, *Miller* and *Anderson* involve many of the same parties in interest, similar subject matter, and the same factual and legal issues. All three of the cases involve Bank of America as a defendant. The individual plaintiffs in the Federal Action are members of the putative class in *Anderson*.

1 The class in *Miller* was defined as California residents who maintained a
2 checking or savings deposit account with Bank of America into which payments of Social
3 Security benefits or other public benefits are or have been directly deposited by the
4 government or its agent. Plaintiffs asserted that charging such fees constitutes a creditor's
5 “setoff” barred by California law — in particular, *Kruger v. Well Fargo Bank* 11 Ca1.3d
6 352 (1974) — which limits creditors' rights to perform a “setoff” against accounts
7 receiving government benefits electronically. The *Miller* complaint also alleged that the
8 Bank was guilty of fraud and misrepresentation when it encouraged customers to avail
9 themselves of electronic deposit, rather than receiving their Social Security benefits
10 through the U.S. mails.

11 *Anderson* involves issues exactly the same as those tried in *Miller*, namely,
12 whether charging fees violates *Kruger's* policy about creditor setoffs, and whether the
13 Bank misrepresented its right to charge fees or the benefits of electronic deposit. All the
14 causes of action that were tried in *Miller* are reasserted in *Anderson*. The main difference
15 between *Miller* and *Anderson* is that the class period for the latter is alleged to begin on
16 January 1, 2004 (after the trial in *Miller* commenced). Other than this, the *Anderson*
17 (putative) class is virtually the same as the class certified in *Miller*.

18 Plaintiffs in the Federal Action simply copied verbatim portions of the
19 complaint in *Miller*, and have adopted them as their own. Plaintiffs here have named as
20 defendants Bank of America, NT & SA, Liberty Reverse Mortgage, and Seattle Financial
21 Group. The theory of recovery, factual allegations and causes of action in the Federal
22 Action are virtually identical to those alleged in *Miller* and *Anderson*. With the exception
23 of plaintiffs' fifth cause of action for defamation, each cause of action plaintiffs have
24 brought in the Federal Action was also brought by plaintiffs in *Miller*. In addition, each of
25 the allegations offered in support of each of the first four causes of action in the Federal
26 Action are virtually identical to those causes of action in the *Miller* complaint. The only
27 real difference between the present complaint and the complaint in *Miller* and *Anderson* is
28 that plaintiffs here name two additional defendants: Seattle Financial Group and Liberty

1 Reverse Mortgage. But, beyond the case caption, Seattle Financial Group is not even
2 mentioned in the complaint in the Federal Action.¹ And the only two allegations that
3 expressly mention Liberty Reverse Mortgage appear in the section of the complaint
4 describing the “Parties” to the action.

5 **4. Coordination Of The Federal and State Actions**

6 The Superior Court for the County of San Francisco stayed the *Anderson*
7 matter pending the resolution of *Miller* before the California Supreme Court. Bank of
8 America believes that a stay of the Federal Action also is appropriate. On July 11, 2008,
9 Bank of America filed with this Court a Motion to Stay the Federal Action pending the
10 resolution of *Miller*.

11
12
13 Dated: July 21, 2008

14 DEBRA S. BELAGA
15 AARON M. ROFKAHR
16 O’MELVENY & MYERS LLP

17 By: _____/s/
18 Aaron M. Rofkahr
19 Attorneys for Defendant
20 Bank of America NT & SA

21 SF1:721601.2
22
23
24
25
26
27

28 ¹ The complaint in the Federal Action references a “Seattle Mortgage Company” (¶ 11) and a “Seattle Savings Bank” (¶ 2), but not Seattle Financial Group.